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AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued)

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The meeting was called to order at 10.05 a.m.

AGENDA ITEM 146: REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-EIGHTH SESSION (continued)

1. Mr. BOS (Netherlands) said that the proposal by the International Law Commission to limit the scope of the draft Code of Crimes against the Peace and Security of Mankind to a carefully selected group of serious crimes was a welcome improvement on the draft given a first reading in 1991. A similar desire to limit the scope could be seen in the statutes of the two ad hoc tribunals and in the discussions in the General Assembly and the committees on the establishment of an international criminal court, which showed that States were only willing to give up part of their sovereignty, and only when the crimes were extremely serious and shocked the conscience of mankind.

2. The Commission had sought to further limit the scope of the draft Code by including the qualification "in a systematic manner or on a large scale" in articles 19 and 20. That qualifier had been added in recognition of the fact that crimes against the peace and security of mankind constituted the most serious international offences. It remained to be seen whether the qualifier could be used by the Preparatory Committee on the establishment of an International Criminal Court in relation to other crimes.

3. His delegation was in favour of the fairly general way in which the draft Code approached issues such as defence, judicial guarantees and sentences, as such details were perhaps better left for further elaboration by either the States concerned or by the court.

4. Of the three possible forms which the draft Code might take, his delegation preferred its incorporation in the statute of an international criminal court, since history showed that the question of international criminal offences for which individuals bore criminal responsibility under international law was closely linked to the question of the international adjudication of such crimes. For example, the Commission had had to stop its work on both a draft code and a draft statute for an international criminal court in 1954 because agreement could not be reached on the definition of aggression. Moreover, one of the major issues in the discussions on an international criminal court was the selection and definition of crimes. All the issues dealt with in the draft Code, such as individual criminal responsibility, punishment and the principle of universality, were also the subject of intense discussion in the Preparatory Committee, indicating that the specific mandates relating to the draft Code and the international criminal court were converging. Given that overlap, his delegation believed that the most efficient way to deal with those interrelated questions was to choose one body, preferably the Preparatory Committee, to discuss the issues relating to the establishment of an international criminal court, including those touched upon in the draft Code. The draft Code was a major step forward in the international community's efforts to enforce criminal liability for violations of international humanitarian law.

5. Mr. MIKULKA (Czech Republic) said that the International Law Commission's decision to limit the scope of the draft Code to crimes which posed an undeniable threat to the peace and security of mankind would improve the Code's prospects of adoption. His delegation shared the view of the Commission that limiting the scope of the draft Code to the most serious crimes did not imply any doubts as to the criminal nature of other individual crimes under international law, nor did it prejudge the future development of the law in that area.

6. The draft Code established two main principles, the principle of individual responsibility for crimes of an international nature and the principle of the direct applicability of international law to the perpetrators of such crimes, in line with modern trends in international law. His delegation was pleased with the way in which individual criminal responsibility was linked to State responsibility in the draft; as the Commission had pointed out in its commentary on article 4, the punishment of individuals guilty of crimes against the peace and security of mankind did not exempt the State from its responsibility for internationally unlawful acts.

7. Article 1, paragraph 2, made clear that international law took precedence over national law when the two were in disagreement, even for the purposes of nullum crimen, nulla poena sine lege. At the same time, it did not rule out the active role of national law, when it was in accordance with international law, in the prosecution of individuals suspected of a crime under international law.

8. Whereas part I dealt with general principles, part II defined the various crimes against the peace and security of mankind and presented the substantive law that would be applied in practice. With regard to the crime of aggression, his delegation agreed with the solution in article 8 whereby jurisdiction over that crime was vested in an international criminal court. The thorny problem of defining aggression had been cleverly solved by having the Code deal with individual responsibility rather than with the definition of what constituted an unlawful act committed by a State. The Code also recognized that, for responsibility to be attributed to an individual, that individual had to be participating in a State activity at a decision-making level. It thereby limited responsibility for a crime of aggression to leaders or organizers, while extensively listing the activities which would render individuals responsible for that crime.

9. The need to determine that an act of aggression had been committed by a State, which could only be done by the Security Council, before an individual could be held responsible for an act of aggression raised several problems. For example, it might well prove difficult to ensure that the decisions of the Council were consistent with those of the judicial body called upon to implement the provisions of the Code. He wondered whether an international court would be able to prosecute an individual if the Security Council had not determined the existence of an act of aggression. Such problems were not addressed in the draft Code, but would need to be solved if the Code was to work in practice.

10. With regard to the crime of genocide, his delegation welcomed the inclusion in article 17 of article II of the Convention on the Prevention and Punishment of the Crime of Genocide, a definition also used in the statutes of the

tribunals established for the former Yugoslavia and Rwanda. His delegation also welcomed the inclusion of crimes against humanity, in article 18, in place of the notion of systematic and massive violations of human rights. Crimes against humanity were distinguished from isolated criminal acts by their scale, the systematic manner in which they were carried out and the fact that they were instigated by a Government, organization or group. Article 18 incorporated all the developments in the concept of crimes against humanity since it had been established in the Nürnberg Charter. He also welcomed the decision to retain the expression "war crimes" and the wording already used in many existing instruments. The advantage of having the provisions of the Code harmonized with those of other instruments far outweighed the disadvantage of the lack of consistent terminology within the article.

11. His delegation had some doubts about the inclusion of crimes against United Nations and associated personnel, despite the laudable aims behind that decision. As such crimes were not included in existing law, they could only be punished by means of a treaty obligation between the States concerned, which would have to be borne in mind when the form of the Code was decided upon.

12. His delegation welcomed the Commission's decision not to retain certain crimes as separate crimes, but to include some aspects of those crimes in the provisions of articles dealing with crimes against humanity and war crimes. With regard to punishment, the Commission had correctly formulated the only principle which could be deduced from customary law, namely, that the punishment should reflect the nature and seriousness of the crime. The Commission had also correctly left the scale of penalties to be determined by the statute of an international court or by national law.

13. Although the Commission had left open the question of the form the draft Code would eventually take, certain provisions in the Code seemed to have been drafted with its adoption in the form of a convention in mind. However the incorporation of the Code in the statute of an international criminal court merited serious consideration; such a statute would take the form of a convention. Meanwhile, his delegation would welcome a declaration by the General Assembly as a first step on the road to adoption and shared the Commission's concern that the Code should be accepted as widely as possible.

14. In the current international climate, the time was right for the codification of the substantive law in the area of international criminal justice as well as the establishment of an international criminal court. He hoped that the spirit of compromise which had prevailed within the International Law Commission would encourage Member States to be sufficiently open-minded to make the code a reality in the very near future.

15. Mr. CROOK (United States of America) noted with satisfaction that in preparing the current version of the draft Code, the Commission had sought to address many legitimate and deeply held concerns of Governments, including his own. The Commission had wisely decided to limit the scope of the draft Code to a core group of serious offences while excluding international terrorism, illicit drug trafficking and "environmental crimes". His delegation further appreciated the clarification by the Commission of the mental states required

for the commission of crimes and the definitions of key terms or concepts set forth in the commentaries.

16. With regard to article 16, on aggression, his delegation had previously expressed its concern about the definition of aggression. In its earlier work, the Commission had drawn on General Assembly resolution 3314 (XXIX) and Article 2, paragraph 4, of the Charter of the United Nations in seeking to define that term. Those provisions did not constitute an adequate basis for a criminal-law definition, nor did they properly reflect the historical roots of the crime of waging aggressive war, which lay in the aftermath of the Second World War.

17. In its current text, the Commission appropriately recognized that the draft Code was concerned with the conduct of individuals, not States. His delegation appreciated that approach; nevertheless, the concept of aggression remained difficult to define. For that reason, his delegation had urged that the crime of aggression should not be included within the jurisdiction of an international criminal court at the current stage.

18. While the text of article 18 (Crimes against humanity) was generally acceptable, some areas warranted further study. For example, it was necessary to consider whether the Commission's requirement that a prohibited act should be "instigated or directed by a Government or by any organization or group" might be overly broad or vague. Moreover, his delegation was not persuaded that enforced or involuntary disappearance constituted a matter for universal and international criminal jurisdiction. The criminal conduct involved should at least be defined more precisely.

19. His Government was satisfied with the inclusion in the draft Code of crimes against United Nations and associated personnel, although it believed that some of the key terms used in the article could be defined more precisely.

20. Lastly, in the chapeau of article 20 (War crimes), the Commission had sought to draw a distinction between those war crimes which were to be left to national jurisdiction and those which were of such magnitude as to constitute crimes against the peace and security of mankind. His delegation, however, questioned the adequacy of the formula proposed for making that distinction. In addition, the Code appeared to draw in several instances on the provisions of Protocols I and II Additional to the 1949 Geneva Conventions. Neither of those instruments, nor the concepts drawn from them, were universally accepted. It was necessary to examine closely ~~the~~ extent to which the provisions of article 20 were based on conventional or customary law. His delegation doubted, for example, that the provision on damage to the natural environment should be included in the draft Code.

21. His delegation wished to emphasize once again the need for all Governments to have a further opportunity to study the draft Code and to consider its implications for the ongoing negotiations concerning the establishment of an international criminal court. The best course of action would be for the Committee and the General Assembly to transmit the draft Code to Governments for their review and comment, with a view to determining what further steps might be appropriate.

22. Mr. CHEN Shiqiu (China) said that the draft Code had been formulated on the basis of international practice since the end of the Second World War and the relevant international legal instruments. The overall legislative approach thus reflected the main trends of the criminal law legislation of the international community. However, the text had some serious problems which, if left unsolved, would have a serious impact on its universal acceptance.

23. It was appropriate to include in the draft Code the widely accepted principle of non bis in idem, but the exceptions to the principle provided in article 12 did not reflect its true implications and would inevitably give rise to controversies. For example, the problem with paragraph 2 (a) was that if the international criminal court could pass judgement on the appropriateness of a judgement by a national court, then it was acting as a court of review when it retried a case. That was one of the more controversial issues in the deliberations on the draft statute for an international criminal court; almost all States preferred that the future court should have no review jurisdiction. The Chinese Government believed that an international criminal court should act only as a complement to national courts, with no right to review judgements of national courts or to retry cases already tried by them.

24. With regard to paragraph 2 (b), it was true that the criminal legislation of some States provided that their courts had the right to retry cases tried by foreign courts, but that provision embodied the principle of the independent judicial sovereignty of States, which the provisions of the paragraph might impair. The principle of aut dedere aut judicare already provided some legal basis for according priority in the exercise of jurisdiction to States in whose territory a criminal act took place and to injured States. Furthermore, international law should not establish an obligation for a State to accept the retrial by the courts of another State of a case tried by its own courts.

25. His delegation understood the intention of the inclusion, in article 19, of crimes against United Nations and associated personnel, but it doubted whether the content of the crime justified its inclusion. Although they were becoming more serious, such crimes could not really be regarded as serious crimes against the peace and security of mankind, and their inclusion rendered incomprehensible the exclusion of such relatively serious crimes as international terrorism and drug trafficking. They also lacked a legal basis, since the Convention on the Safety of United Nations and Associated Personnel had not yet entered into force. Furthermore, the text of article 19 did not contain precise definitions of its main terms. The article should therefore be deleted.

26. The draft Code and the draft statute of an international criminal court were closely related, but there were inconsistencies between the provisions of the draft Code and the views of most of the States which had participated in the Preparatory Committee. For example, most States were against the inclusion of the crime of aggression in the jurisdiction ratione materiae of the court on the ground that in the absence of a widely accepted definition of aggression such inclusion was inconsistent with the principle of nullum crimen sine lege. An effort must be made to harmonize the two texts.

27. His delegation's concerns were shared by many other delegations and should be given full attention in the future deliberations. Only if solutions

acceptable to all States were found would the first international instrument on criminal justice come into being.

28. Mr. de SARAM (Sri Lanka) said that the provisions of the draft Code were generally acceptable to his delegation. The subject of such a code had in recent years become one of considerable importance to the international community while at the same time a subject of considerable difficulty, as it touched on some of the most sensitive aspects of relations between States and the relationship between United Nations organs. The Commission's approach to the formulation of the draft Code, with which his delegation concurred, appeared to have been as follows: to set forth those general principles that could, at the current stage of development of international criminal law, be deemed to govern individual criminal responsibility; to identify and define those particular crimes which, owing to their magnitude, would be most likely to elicit the broadest possible consensus; and to make possible, through adequate and precise characterization of such crimes, the institution of criminal proceedings, either on the basis of universal national jurisdiction or, where necessary, through an international accord, against the individuals responsible.

29. It should be noted, however, that, such a code could not be viewed as either all-encompassing or fixed for all time. It should be made clear in the text of the instrument establishing the draft Code that the Code's substantive scope might be enlarged in years to come as further possibilities for a clear consensus emerged.

30. While the draft Code should, on the whole, constitute a codification of existing law, it was doubtful whether every provision of the draft Code needed to be based on existing law. It was not easy to distinguish between codification and the progressive development of international law, and difficulties could arise if the drafting of the proposed instrument departed from generally accepted multilateral treaties. Nevertheless, his delegation believed strongly that, when the draft Code touched on questions relating to the Geneva Conventions and Protocols Additional thereto, its provisions must be closely examined by persons with the necessary expertise.

31. As to the question of including the crime of aggression, his delegation shared the view expressed by the representative of Brazil that the provisions put forward by the Commission had been carefully drafted and deserved close consideration.

32. While some delegations had expressed doubts concerning article 19 (Crimes against United Nations and associated personnel), his delegation believed that the article should be included, since those who risked their lives in remote places on behalf of the Organization deserved to be protected.

33. Article 20 (War crimes) required further scrutiny, as it concerned not only international armed conflict, but also armed conflict not of an international character; the term "war" did not cover both cases.

34. Lastly, on the question of the relationship between the Commission's work on the draft Code and the work of the Preparatory Committee for the Establishment of an International Criminal Court, his delegation again agreed

with the Brazilian delegation that for the Sixth Committee simply to refer the recommendations contained in the Commission's report (A/51/10) to the Preparatory Committee would be overly limiting. It would be preferable to make every effort to ensure that the draft Code, after due consideration by Governments, was incorporated into a multilateral treaty as a step towards building a body of international criminal law.

35. Mr. KATEKA (United Republic of Tanzania), noting that the Commission had asked the General Assembly to select the most appropriate form for the draft Code, said that his delegation favoured its incorporation in the draft statute for an international criminal court. The Commission had established an inextricable link between the draft Code and the court, and the two instruments would have to be harmonized. There would be no need to adopt the draft Code in a separate convention, although a convention would be acceptable provided that it linked the draft Code to the court. It should not be adopted as a declaration of the General Assembly.

36. The Commission had reduced the list of crimes to five as a compromise between the maximalist and minimalist trends. His delegation noted that the crimes of international terrorism and illicit drug trafficking had been omitted, together with the crime of wilful and severe damage to the environment. It was not entirely convinced by the argument that a restrictive list of crimes would ensure the widest acceptance of the draft Code, but it agreed with the Commission that the inclusion of certain crimes did not affect the status of other crimes under international law.

37. The omission of a definition of aggression was a source of concern, and the text of article 16, which confined itself to the responsibility of an individual for aggression, might cause problems for the future court. The Commission did note in the commentary that aggression by a State was a sine qua non of individual responsibility for the crime of aggression. Given that linkage, the Commission should at least have defined aggression in general terms and included a list of offences.

38. A distinction had been made between crimes which could be prosecuted on the basis of general international law and those which required the existence of a convention, and the Commission had indicated in the commentary to article 1 that it should be left to practice to define the exact contours of the concepts of crimes against the peace and security of mankind. However, as the Special Rapporteur had pointed out, such reliance on the existence of treaties would limit the progressive development of international law. Accordingly, the Commission or the Preparatory Committee might wish to reconsider some crimes that had been excluded.

39. Subject to those qualifications, his delegation supported the gist of the draft articles, in particular the dual criteria of "systematic" and "large-scale" for the crimes covered by articles 18 and 20, the two separate jurisdictional regimes established in article 8, and an exclusive regime for the crime of aggression (article 16) subject to a limited exception of the national jurisdiction of a State committing aggression against its nationals.

40. His delegation agreed with the Commission's position that the principle of individual criminal responsibility (article 5) was the cornerstone of international criminal law. It endorsed the provisions of article 9 on the obligation of the custodial State to extradite or prosecute and the rejection of the defence of superior orders. The Commission had been wise to leave open the question of specific penalties and it had satisfied international standards of due process and the principles of non bis in idem, non-retroactivity, and extenuating circumstances. His delegation urged Member States to support the draft Code.

41. Mr. CANDIOTI (Argentina) said that the International Law Commission had shown a constant commitment to peace, international security and the dignity of the human person, and it should continue to play an important role in the creation of a fairer world order. The Commission and its Special Rapporteur deserved particular commendation for producing the final text of the draft Code of Crimes against the Peace and Security of Mankind, particularly at a time when States were moving towards the establishment of an international criminal court.

42. The Commission had been right to limit the categories of crimes covered by the draft Code with a view to securing universal acceptance of the text. That approach took into account the evolution of international relations and was consistent with the trend in the Preparatory Committee to limit the competence ratione materiae of the court to a "hard core" of crimes.

43. The definitions adopted by the Commission would facilitate progress towards the characterization of the most serious atrocities committed within a country as international crimes. In the light of events in the former Yugoslavia and Rwanda, serious thought should be given to the current state and future direction of the development of the criminal aspects of international humanitarian law applicable in non-international armed conflicts. His delegation therefore agreed that the category of war crimes should include crimes committed in such conflicts. It had once been generally accepted that neither common article 3 of the 1949 Geneva Conventions or Additional Protocol II thereto could trigger the exercise of a universal jurisdiction and that those provisions did not constitute a sufficient basis for international criminal responsibility. However, article 4 of the Statute of the Rwanda tribunal included both provisions and thus corrected one of the main weaknesses of international humanitarian law. It was encouraging that the Commission had decided to continue that trend.

44. It was correct to include crimes committed in peacetime among the crimes against humanity, for such crimes could jeopardize international peace and security. His delegation also supported the inclusion of crimes committed against United Nations and associated personnel because of the intolerable increase of attacks on them. There was also ample justification for the inclusion of the crime of aggression, but the problem of the definition of aggression would give rise to legal difficulties in the determination of individual criminal responsibility. The issue would require further deliberation, as would the delimitation of the spheres of competence of the international criminal court and the Security Council.

45. Consideration must also be given to the links between the draft Code and the draft statute. It would perhaps be premature to opt for one of the three alternatives proposed by the Commission for the form the draft Code might take, but the Preparatory Committee was the most appropriate forum for discussing the question. The connection between the draft Code and the draft statute was both close and necessary, for in the Preparatory Committee States had tended to favour incorporation in the draft statute of definitions of the crimes falling within the court's competence, so that it would not be a strictly procedural instrument but would include some rules of substantive criminal law. It would be counter-productive if the draft Code and the statute contained different definitions of identical international crimes.

46. Mr. HILLGENBERG (Germany) said that the completion of the Commission's work on the draft Code of Crimes against the Peace and Security of Mankind came at a time when the establishment of the ad hoc criminal tribunals for the former Yugoslavia and for Rwanda had shown the need for codification of the most serious crimes under international law, which, together with an elaboration of procedural regulations, would enable the international community to bring to justice those who were individually responsible for the commission of such crimes. His delegation believed that the draft Code should be adopted, possibly with a few minor adjustments, as a declaration by the General Assembly. It could thus serve as a source of inspiration for the Preparatory Committee currently engaged in drafting a statute for a permanent international criminal court.

47. The German Government strongly supported the Commission's decision to include in the draft Code only those offences generally accepted as crimes against the peace and security of mankind. Given that the purpose of the draft Code was to facilitate the prosecution and punishment of individuals who perpetrated crimes of such gravity that they victimized mankind as a whole, it seemed a very sound approach to restrict the list to a few core crimes, the so-called "crimes of crimes". His delegation was also gratified that the question of implementation had been dealt with in part I of the draft Code, which laid down specific procedural regulations on jurisdiction, extradition and procedural rights of the accused.

48. The extensive catalogue contained in article 11, and also articles 12 to 15, provided sufficient guarantees for a fair trial of any individual charged with a crime against the peace and security of mankind. His Government therefore strongly favoured preserving the principles set forth in those articles. With regard to article 8, however, it believed that it should be the prerogative of national courts to try the perpetrators of the crimes enumerated in articles 17 to 20. An international criminal court should exercise its jurisdiction only where national jurisdiction had failed to bring those perpetrators to justice.

49. In the second and third sentences of article 8, the Commission had tried to establish a balance between the fundamental principle of par in parem imperium non habet and the need to bring to justice by means of national jurisdiction the perpetrators of the crime of aggression. The question arose as to whether a State's jurisdiction should be limited to bringing its own nationals to trial. It could be argued that national jurisdiction should be established in a broader

sense. For example, a State that had been the victim of the crime of aggression could hardly be deprived of the right to bring foreign individuals to justice under its own national jurisdiction. That question, and the question of how to prevent possible abuses, should be further explored.

50. His Government welcomed the fact that the issues of individual responsibility and punishment were addressed in articles 2 and 3 of the draft Code. Article 2, however, should be more specific: paragraph 3 reflected notions of commission, complicity, aid and attempt that were so broad as to render personal liability to prosecution almost limitless, particularly in the light of the principle of nullum crimen sine lege. Too sweeping a notion of participation in a crime could lend itself to abuse, thereby reducing its prospects of being accepted by the international community. Article 2 should focus on enabling the international community to bring to justice the main perpetrators of crimes that were of such gravity as to victimize mankind as a whole.

51. An individual must also know what kind of penalty might follow the perpetration of a crime. It was unfortunate that, in article 3, the Commission had not laid down specific penalties for specific crimes, but had left it to the different legal systems claiming jurisdiction to establish adequate punishment. Not only was that inconsistent with the nulla poena sine lege principle, but it also made implementation of the extradition principle, laid down in article 9, very difficult. Extradition procedures between States that had abolished the death penalty and States that still imposed it had shown what difficulties could arise in such circumstances. In his delegation's view, the Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda could have offered a solution to that problem. Under both Statutes, the penalties imposed for the commission of crimes comparable to those enumerated in the draft Code were limited to imprisonment. His Government would have welcomed the incorporation of a similar rule in the draft Code.

52. The crime of aggression must form an integral part of the draft Code, as it was a crime of such gravity as to threaten to victimize mankind as a whole. The Commission had been very successful in limiting the applicability of article 16 to those individuals who had the necessary authority or power to commit the crime of aggression. On the other hand, it had made no attempt to define aggression for the purposes of international criminal law. Difficult though that task was, his delegation strongly believed that, in accordance with the nullum crimen sine lege principle, those elements of fact and personal behaviour which, when combined, constituted possibly the most serious crime against the peace and security of mankind should be described in the Code. As any qualification of individual behaviour as a crime of aggression must be preceded by a determination that a State had committed aggression, and as article 24 of the Charter conferred on the Security Council primary responsibility for the maintenance of international peace and security, such a definition would have to take the responsibility of the Council into account. That question should be further examined.

53. On article 18, his delegation fully supported the inclusion of subparagraph (f), covering institutionalized discrimination on racial, ethnic or religious grounds. Historical experience had shown that such discrimination

could be the first step towards systematic genocide. Relatively recent events in Srebrenica also justified the inclusion of forced disappearance of persons under subparagraph (i).

54. Article 19 constituted the most prominent example of the progressive development of international law within the draft Code, and its inclusion was to be welcomed. However, a few questions remained to be resolved before a final, generally acceptable version of the article was agreed on, including the possible application of the article to the personnel of regional organizations such as the Organization for Security and Cooperation in Europe, the Organization of African Unity and the Organization of American States, and whether paragraph 1 (b) really pertained to a crime of such gravity that it could be classified as a crime against the peace and security of mankind.

55. German foreign policy had long sought to achieve some form of protection of the natural environment in armed conflicts. Environmentally destructive warfare must be combated and punished. His delegation therefore welcomed the addition of subparagraph (g) to the list of war crimes described in article 20.

56. Mr. JOSEPH (Singapore) said that the International Law Commission had left it to the General Assembly to decide on the exact form to be taken by the draft Code. In his delegation's view, the draft Code must be adopted in a form that gave it the necessary binding legal force to ensure its efficacy. It had become apparent that there was a considerable overlap between the issues it raised and those currently being considered by the Preparatory Committee on the Establishment of an International Criminal Court, ranging from the definition of crimes and the principles of criminal responsibility to double jeopardy and the obligation of States to extradite or prosecute. Rather than being the subject of a separate exercise aimed at the drafting of an international convention and conducted in parallel with efforts to establish the international criminal court, the draft Code should be forwarded to the Preparatory Committee with a recommendation that it should be used, along with other proposals before the Committee, as the basis for drafting the statute of the court.

57. The definitions of crimes contained in part II of the Code represented a substantial contribution to the development and codification of international criminal law. His delegation particularly welcomed the inclusion of crimes against United Nations and associated personnel and the use in armed conflict of methods and means of warfare calculated to cause widespread, long-term and severe damage to the natural environment, particularly in the light of their emergence as crimes under customary international law.

58. Certain aspects of the definition of crimes and the principles of criminal responsibility required further elaboration. For instance, there was no detailed treatment of the applicable defences under article 14. The precise definition of whether and when criminal liability attached to an individual was of critical importance if effect was to be given to the nullum crimen sine lege principle. Individuals must be in a position to apprise themselves of the law and its limits in order to know whether a proposed course of action was legal or not, particularly where decisions potentially falling within the scope of international criminal jurisdiction were involved.

59. His delegation also had serious reservations concerning article 12, paragraph 2 (b), which appeared to derogate from the non bis in idem principle. While the territorial State and the victim State both deserved sympathy, that was not sufficient reason for overriding that principle. Where the custodial State had not acted in good faith or had shielded the accused from criminal responsibility, the solution would be to vest the court with the power to make an objective determination to that effect and to exercise the appropriate jurisdiction to ensure that justice was done.

60. Nevertheless, while certain aspects of the Code required further reflection or elaboration, his delegation broadly endorsed its provisions, many of which should be incorporated in the statute of the international criminal court.

61. Mr. ECONOMIDES (Greece) said that, from the legal standpoint, one could question the wisdom of establishing a dual regime whereby crimes of aggression - far and away the most serious crime in relations between States - would be tried by an international criminal court, while the other four crimes included in the draft Code would be subject to the concurrent jurisdiction of national courts and an international criminal court. It was not clear why a case of aggression which had been noted, explicitly or implicitly, in a Security Council resolution, could not be subject to concurrent jurisdiction in the same way as, for example, a crime against humanity instigated or directed by a Government, as envisaged in article 18.

62. The draft Code was not complete, as the Commission itself recognized in paragraph (3) of the commentary to article 2. His delegation was disappointed by its reduced scope and felt that other crimes such as intervention, colonial domination and other forms of alien domination, apartheid and the recruitment, use, financing and training of mercenaries should have been included. One major crime had been omitted, the threat of force, which under Article 2, paragraph 4, of the Charter was, along with force itself, expressly and categorically prohibited. The prohibition of the threat of aggression was a fundamental rule which was generally considered to have acquired the character of jus cogens. That omission should be remedied, particularly since for the less serious crimes envisaged in articles 17 to 20, the draft Code went quite far and rightly punished not only complicity but also attempt. At the very least, an additional provision should be inserted in article 1 specifying that those crimes, although not included in the text of the draft Code, were nevertheless crimes against the peace and security of mankind and were regulated, as applicable, by ad hoc international conventions and customary rules which at times had the value of jus cogens.

63. With regard to article 3, the need to punish severely individuals who were responsible for crimes against the peace and security of mankind should derive directly from the text of the article and not only from the commentary. His delegation noted that the draft Code did not exclude the death penalty. In article 5, the phrase "if justice so requires" was superfluous; in articles 14 and 15 the expression did not appear, although it was implied.

64. His delegation felt that until the Preparatory Committee on the Establishment of an International Criminal Court completed its work, it would be unwise to take a decision on the final form of the draft Code. The Committee

should urge the Preparatory Committee to draw on the draft Code as broadly possible and in particular to incorporate the definitions of crimes found in the text of the draft statute. The best solution would be to coordinate the draft Code and the statute to the extent possible.

65. Turning to the question of State succession and its impact on the nationality of natural and legal persons, he said that in September 1996, the European Commission for Democracy through Law (Venice Commission), an intergovernmental body of the Council of Europe, had adopted a declaration and explanatory commentary on the consequences of State succession for the nationality of natural persons. The declaration dealt only with natural persons largely because of the lack of State practice with regard to the nationality of legal persons. The Venice Commission had relied mainly on State practice, but had also taken into account conventional and above all customary international law.

66. The declaration laid down three fundamental principles - the right of each person to a nationality, the obligation to avoid statelessness, and the right of option - and set forth rules and recommendations for the practical implementation of those principles.

67. The most important rule was that in all cases of succession, the successor State must grant its nationality to nationals of the predecessor State residing permanently in the territory concerned. That obligation was in the interests of both the successor State and the persons concerned, and accorded with State practice and with the rules of general international law. The successor State could choose not to grant its nationality to nationals of the predecessor State who did not have effective links with the territory concerned or those who were residing in the territory in order to perform public service.

68. Two other rules established the principle of non-discrimination. First, nationality must be granted, as a human right, to all nationals of the predecessor State residing permanently in the territory concerned, without any distinction as to ethnic origin, religion, language or political opinions. Second, once nationality was granted, there could be no discrimination of any kind among nationals of the successor State. Moreover, it was desirable for the successor State to grant its nationality to persons from the territory affected by the succession who had the nationality of the predecessor State and who, at the time of succession, were not resident in that territory, and to persons residing permanently in the territory affected by the succession who, at the time of succession, had the nationality of a third State.

69. In order to prevent persons from becoming stateless, the successor State must grant its nationality to any persons, whether permanent residents of the territory concerned or persons originating from that territory, who would become stateless as a result of succession, and must not withdraw its nationality from its own nationals who were not entitled to acquire the nationality of the successor State.

70. It was left to the discretion of successor States to determine the conditions in which the right of option would be granted, but they were required to grant that right in favour of the predecessor State when the persons

concerned had effective links with that State, and in favour of one of the successor States when the persons concerned had links with that State or had previously held the nationality of a subdivision of the predecessor State corresponding to that successor State. The right of option must be exercised within a reasonable period from the date of succession and must have no adverse consequences for the persons concerned, particularly with regard to their residence in the successor State or their movable or immovable property in that State - a new rule which derived from the progressive development of law and accorded with international human rights standards.

71. It was specified in the commentary to the declaration that the succession must be legal under international law and must not result from occupation or annexation through the use of force in violation of Article 2, paragraph 4, of the Charter, and that when settling questions of nationality, States involved in succession must respect the human rights of the persons concerned.

72. His delegation could accept the Special Rapporteur's suggestion that the question of the nationality of natural persons in cases of State succession should be given priority, but felt that it was too early to take a decision on the form of the instrument to be adopted.

The meeting rose at 12.45 p.m.